No. 95-1201

In The

Supreme Court of the United States

October Term, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, and DAVID SERENA,

Appellants,

v.

MONTEREY COUNTY, CALIFORNIA, STATE OF CALIFORNIA, *et al.*,

Appellees,

and

STEPHEN A. SILLMAN,

Intervenor-Appellee.

On Appeal From The United States District Court For The Northern District Of California

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY AMENDING ITS INTERLOCUTORY INJUNCTIVE ORDER TO DIRECT A COUNTY-WIDE ELECTION OF MUNICIPAL COURT JUDGES IN A SECTION 5 COVERED COUNTY, WHERE NO SECTION 5 VIOLATION HAS YET BEEN DETERMINED, WHERE PLAINTIFFS DELAYED 20 YEARS IN BRINGING THEIR ACTION TO CHALLENGE HISTORIC COUNTY ORDINANCES, WHERE A RETURN TO THE 1968 STATUS QUO WAS NO LONGER FEASIBLE, WHERE THE ORDINANCES WERE NOT SHOWN TO HAVE HAD EITHER DISCRIMINATORY PURPOSE OR DISCRIMINATORY EFFECT, WHERE THE ORDINANCES MAY HAVE BEEN SUPERSEDED BY INTERVENING STATE LAW, WHERE THE COURT'S COUNTY-WIDE ELECTION SCHEME CONFORMS TO STANDARD NEUTRAL STATE DISTRICTING PRINCIPLES, AND WHERE THE COURT'S PREVIOUSLY ORDERED ELECTION SCHEME WAS PATENTLY VIOLATIVE OF THE FEDERAL CONSTITUTION AND OF THE VOTING RIGHTS ACT IN LIGHT OF THIS COURT'S DECISION IN *MILLER v. JOHNSON*.

2. WHETHER THE DISTRICT COURT'S 1994 ONE-TIME EMERGENCY INTERIM ELECTION ORDER, WHICH WAS EXPRESSLY INTENDED TO HAVE NO SUBSEQUENT PRECEDENTIAL EFFECT AND WHICH EMPLOYED ELECTION SUB-DISTRICTS WHICH THE COURT HAD REJECTED WHEN PROFFERED AS A LEGISLATIVE PLAN, MUST BE VIEWED AS THE "BENCHMARK" BY WHICH SECTION 5 "RETROGRESSION" IS TO BE MEASURED, NOTWITHSTANDING THE FACT THAT THE ELECTION SCHEME VIOLATED THE STATE CONSTITUTION; THE ELECTION SUB-DISTRICTS WERE CONFIGURED EXCLUSIVELY ON THE

QUESTIONS PRESENTED – Continued

BASIS OF RACE; THE PLAN RESULTED IN A GRATUITOUS THREEFOLD EXPANSION OF LATINO VOTING STRENGTH OVER PREVIOUS LEVELS; AND THE PLAN WAS PATENTLY VIOLATIVE OF THE FEDERAL CONSTITUTION AND OF THE VOTING RIGHTS ACT IN LIGHT OF THIS COURT'S DECISION IN *MILLER v. JOHNSON*.

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6, Appellee State of California respectfully moves to dismiss the appeal or, alternatively, to affirm the interim remedial election order sought to be reviewed, on the ground that the questions on which this Court's decision depends are not sufficiently substantial to require further argument. The injunctive order below is interlocutory in nature and was issued in conjunction with the district court's order reopening the threshold question herein: namely, whether plaintiffs can establish even a technical violation of Section 5 of the Voting Rights Act (42 U.S.C. § 1973c) in this proceeding. Thus, at this point, the court below has not reviewed all the relevant facts, and there is no final determination that Monterey County's conducting of the challenged judicial elections would violate Section 5 at all.

Further, while Section 5 actions are normally brought in an effort to preserve the election status which existed before the filing of the complaint, plaintiffs here – who waited 20 years before insisting upon preclearance – attempt to use their complaint as a lever *to effect radical changes* in those voting procedures. They *attack* the status quo as it existed before their action was filed, and they oppose any return to the status which existed in 1968, prior to enactment of the historical county ordinances which are the focus of their complaint. Instead, with the apparent complicity of the United States Department of Justice[1] and without having established either

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[1] The United States Department of Justice ("DOJ") has played a rather enigmatic and troubling role in these proceedings. Plaintiffs and the County are apparently convinced that DOJ will refuse to preclear any election plan for municipal court judges unless such plan calls for suspension of California's constitutional districting requirements. (*See Lopez v. Monterey County*, 871 F.Supp. 1254, 1257 (N.D.Cal. 1994); *and see* Parties' 2d. Stipulation at ¶ 5. (Apx. 3a-4a) Yet DOJ *has* endorsed and precleared a proffered 1994 race-based plan (*see* Juris. Stmt., App. 53-55) – just as it did in *Miller v. Johnson*, ___ U.S. ___, 115 S. Ct. 2475, 2493 (1995) – despite the absence of any evidence or findings to justify such a discriminatory approach. And, in suggesting to this Court that a "hearing"

constitutional violations or "retrogression," they have urged the district court to impose "remedial" election plans which are extremely discriminatory in favor of Latinos and against others.

Under the extraordinary circumstances presented in this case, the district court's interlocutory order is consistent with legal precedents established by this Court and presents no conflict requiring this Court's resolution.

STATEMENT OF FACTS

Appellants' "Statement of the Case"

The "Statement of the Case" set forth in Appellants' jurisdictional statement is neither accurate nor complete, and includes a number of assertions which have no bearing on or relevance to this proceeding. Accordingly, their recitation of facts must be corrected.

Although this action, initially filed in September 1991, was brought under the Voting Rights Act, it was filed only as a *Section 5* action, with Monterey County the only named defendant. There was no allegation that the defendant had violated Section 2 of the Act. Rather, plaintiffs alleged only that defendant Monterey County had committed a technical violation of Section 5 by neglecting to obtain "preclearance" before implementing a series of historic county ordinances – promulgated *between 1972 and 1983* – which allegedly had the effect of consolidating a number of different-sized municipal court and justice court districts, some of them extremely small rural districts, into a single county-wide municipal court district.

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should be held to determine whether that 1994 plan comported with normal districting principles, DOJ ignores the undisputed fact that the 1994 plan directly violated two districting requirements of the California Constitution (Juris. Stmt., App 7; *Lopez*, 871 F.Supp. at 1258-1260) and further disregards the County's *admission*, made at the September 28, 1995 hearing, that the plan's electoral sub-districts were configured exclusively on the basis of race. (See fn. 6, *infra*.)

Appellants omit mention of the fact that these plaintiffs waited *nearly 20 years* before challenging the County's 1972 ordinance, or that they waited *fully 8 years* before questioning the validity of the 1983 ordinance. *See Lopez v. Monterey County*, 871 F.Supp. 1254, 1256 (N.D.Cal. 1994). Those ordinances were operational long before this action was brought. Also absent from Appellants' statement is the fact that a number of *state* laws were enacted and *state* constitutional provisions adopted after promulgation of the challenged ordinances – including a statute defining the Monterey County Municipal Court as a single county-wide district and a constitutional provision eliminating justice courts in the State of California – and that these intervening state measures arguably superseded the County's historical ordinances respecting justice court and municipal court districts.[2]

Similarly, Appellants are inaccurate when they assert that the district court has already determined that Section 5 of the Act was violated in this case. To be sure, the court has determined that Monterey County is a covered jurisdiction, and that the County failed to obtain federal preclearance before implementing the historic series of "consolidation ordinances" which is the focus of Appellants' action. But that is not the end of the inquiry. The question whether municipal court elections were conducted in violation of Section 5, at the time the complaint was filed, has *not* yet been finally determined in the court below. The district court, in the selfsame November 1, 1995 order which is the subject of this appeal, also ordered that the State of California be joined as a party defendant and be permitted to raise defenses which have not yet been litigated and which may result in outright dismissal of Appellants' cause of action. *See* Juris. Stmt., App. 7-8. Such defenses might include, for example, the defense of laches; or the claim that county municipal court elections are

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[2] The district court has not yet addressed the effect of these intervening state measures; neither has the district court yet addressed the effect of appellants' inordinate and unexplained delay in bringing their Section 5 action against the County.

conducted, not according to historical county ordinances, but pursuant to superseding state statutes and constitutional provisions which are not subject to preclearance; or even a challenge to the initial designation of Monterey County as a covered jurisdiction under Section 5. Thus, the question whether Section 5 has been violated here, and, indeed, whether Section 5 even has any application to the subject elections, remains to be litigated in the district court.

In addition, Appellants' "Statement of the Case" includes improper allegations of past "discrimination" against Latinos in Monterey County, of geographically concentrated populations, and of alleged historic "Anglo bloc voting." Juris. Stmt., pp. 3-6. The district court has made no findings as to any of these claims, and – because Appellants have not alleged any *Section 2* violation(s) – any attempt by plaintiffs to establish such facts in this context would be futile.[3] Their unproven assertions in this respect are without relevance to this *Section 5* claim. Furthermore, Appellants omit mention of their stipulation that, with respect to promulgation of the historical series of ordinances challenged here, they have *no evidence* that county authorities were motivated by unlawful purpose. *See* Parties' 2d. Stipulation at ¶ 3 (Apx. 2a)[4]

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[3] *See, e.g., Holder v. Hall*, ___ U.S. ___, 114 S.Ct. 2581, 2587 (1994) [mere fact that voting change must be precleared does not make the practice subject to Section 2 vote dilution challenge]; *and see Miller v. Johnson*, ___ U.S. ___, 115 S. Ct. 2475, 2491 (1995) [mere assertions or stipulations that remedy is required are insufficient to justify racially based remedy].

[4] In the context of Section 5 preclearance, the only relevant question is whether an enactment, assuming that it constitutes a change with respect to voting (*cf.* fn. 23, *infra*), is "retrogressive" when compared to the previous electoral system. *See Holder v. Hall, supra*, 114 S.Ct. at 2587, *and see Lockhart v. United States*, 460 U.S. 125, 129 n.3, 103 S.Ct. 998, 1001 n. 3 (1983). And this determination can be made only by the District Court for the District of Columbia. *Perkins v. Matthews*, 400 U.S. 379, 385, 91 S.Ct. 431, 435 (1971). Contrary to appellants' suggestions, no such determination of retrogression has ever been made as to the historical county ordinances at issue here. Furthermore, because the County's various judicial districts in 1968 had enormous disparities in population, and because judges elected in 1968 sat as judges only in the discrete districts in which they were elected, any fair consideration of "retrogression" – if it were to avoid meaningless comparisons of "apples to oranges" or, here, "grapes to watermelons" – would require complex and careful statistical analyses. (*See* Apx. 20a-21a at fn3.)

Appellants also mischaracterize the district court's November 1995 order as a "refusal to enjoin an unprecleared legislative scheme." In fact, the court below has consistently enjoined the County from proceeding according to unprecleared ordinances or programs, and the court's November 1 order is a continuation of that injunction. The election directed therein was ordered, expressly, "[p]ursuant to [the court's] equitable power to effect a remedy." (Juris. Stmt., App. 8.) The court's order of a one-time county-wide election was consistent with the State's standard neutral districting principles (*see* Cal. Const., art. VI, § 16(b)), and came after careful analysis by the court of possible alternative steps. The order issued in a case where the plaintiffs argued that a return to the 1968 status quo was neither feasible nor desirable, where the plaintiffs conceded that the County's historic consolidation ordinances reflected no discriminatory purpose, where the County failed to present an acceptable, precleared alternative plan, where retrogression was neither determined nor determinable (Juris. Stmt., App. 7), and where the court's previous interim election order was unconstitutional in light of this Court's intervening analysis in *Miller v. Johnson*, ___ U.S. ___, 115 S. Ct. 2475, 2493 (1995).[5]

Finally, Appellants' Statement of the Case omits the indisputable and dramatic discriminatory impact of the race-based election plan which Appellants advocate and which was briefly imposed, for a one-time emergency interim election with shortened terms, by the district court in December 1994.

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[5] Indeed, the possibility of a county-wide election was presaged in the court's December 1994 order, wherein the court observed that "ultimately an at-large system . . . may prove, under the totality of circumstances, to be the best judicial election system." *Lopez*, 871 F.Supp. 1254, at 1259.

The County has conceded that this plan, which violated two provisions of the California Constitution, was fashioned *exclusively* on the basis of race, a fact which Appellants neglect to mention.[6] And the plan, unsupported by any judicial determinations of discrimination or "retrogression," resulted in a nearly threefold expansion of Latino voting strength in municipal court elections, with a corresponding diminution of non-Latino voting strength in the County. (*See* Apx. 14a-15a, 20a-21a at fn. 3; *and see* Argument IV, *infra*) Under this Court's decision in *Miller*, that race-based plan is patently violative of the Fourteenth Amendment as well as the Voting Rights Act, notwithstanding the fact that DOJ, as it did in *Miller*, willingly affixed its "preclearance" imprimatur to the discriminatory scheme. The relief which Appellants seek through this appeal would result in prolonging the effect of that radically discriminatory plan, contrary to this Court's holding in *Miller* and contrary to the express wishes of the district court which imposed it in the first place.

Relevant Facts Relied Upon By Appellee on This Motion[7]

As noted above, Appellants' Section 5 action, though it challenges a series of ordinances adopted by Monterey County in the period between 1972 and 1983, was not filed in the United States District Court for the Northern District of

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[6] As Monterey County Counsel Doug Holland admitted during the September 28, 1995 status conference:

> I will be the first one to admit *the reasons for [–] the rationale for [–] the boundaries were in fact race generated. There's no question about it. That was the sole motivation. Nothing else went into those considerations.* To the extent any other factor went in, it was entirely secondary. There's no question about that.

(Apx. 13a; emphasis added.)

[7] Appellee's relevant facts, insofar as they include events preceding December 1994, are derived chiefly from the district court's decision in *Lopez*, 871 F.Supp. at 1256-1257.

California until many years thereafter, on September 6, 1991.[8] Concurrently with and subsequent to promulgation of these local ordinances, various state measures were adopted which affected judicial elections in the County. For example, in 1979 the Legislature *repealed* the former article relating to municipal courts in Monterey County and declared the existence of a new municipal district.[9] That state statute was then amended, in 1989 (Cal. Stats. 1989, ch. 608), to redefine the Monterey County Municipal Court District as a single district encompassing the entire county. (Cal. Gov. Code § 73560.) And, in November 1994, the People of California adopted Proposition 191, thereby altogether eliminating justice courts throughout the State. *See* Cal. Const., art. VI, § 5. (There were seven such justice court districts in Monterey County in 1968. *Lopez*, 871 F.Supp. at 1256.)

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[8] The State of California, which had initially intervened in this case to assert and protect state interests in the remedial phase (*Lopez*, 871 F.Supp. at 1256), was added as a party defendant by order of the district court on November 1, 1995. *See* Juris. Stmt., App. 8. In its recent answer to Appellants' complaint, the State has raised, inter alia, the defense of laches. (Apx. 28a) The district court has not heretofore considered this issue, which was not raised by defendant Monterey County in the earlier litigation of this case. Now that the liability question has been reopened by the court to include the State as defendant, however, the district court will have the opportunity to address the effect of plaintiffs' significant delay in bringing their action. The court will also have the opportunity to consider the State's mootness defenses, which are based upon (1) superseding state statutes and constitutional provisions, and (2) the apparent preclearance of the challenged county ordinances by the U.S. Attorney General on March 6, 1995. *See* State's Answer (Apx. 28a-29a); *and see* Juris. Stmt., App. 53-55. *See also* Apx. 16a-22a (State's Sept. 29, 1995 supplemental letter to district court).

[9] "There is in the County of Monterey, on and after the effective date of this section, a single municipal court district which embraces the former Salinas Judicial District, Monterey Peninsula Judicial District and North Monterey County Judicial District. This article applies to the municipal court established within the judicial district which shall be known as the Monterey County Municipal Court." (Cal. Stats. 1979, ch. 694, § 1.)

On March 31, 1993, the district court found that the challenged historical county ordinances required preclearance but had not been precleared. The court held that those county ordinances "could not be implemented" in the absence of preclearance.

Monterey County then filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking to have the challenged ordinances precleared after the fact. *County of Monterey v. United States of America*, No. 93-1639 (D.D.C., filed Aug. 10, 1993). However, that court made no findings and issued no judgment as to the propriety of preclearance or the related issue of "retrogression"; rather, the County abandoned its preclearance effort, voluntarily dismissing its action through a stipulation with the Appellants herein, which stipulation included the following provision:

> The Board of Supervisors is unable to establish that the Municipal Court Consolidation Ordinances adopted by the County between 1968 and 1983 did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County.

Lopez, 871 F.Supp. at 1256.

Thereafter, the County and Appellants twice submitted stipulations, with proposed election plans and proposed orders, to the court below, asking the court to authorize these plans notwithstanding the fact that the election areas and methodologies devised therein conflicted with controlling provisions of the California Constitution. The State of California intervened in the action and objected to issuance of an order approving the plans.

On December 22, 1993, the district court rejected the first proposed election plan because the parties to the stipulation had failed to establish a need to suspend the California Constitution. On February 28, 1994, the court likewise refused, for the same reasons, to approve the second proposed election plan, which the County now concedes was designed solely for race-based purposes – i.e., to bolster Latino voting

strength in elections for municipal court judges.[10] The County was ordered to devise and to submit for preclearance an election plan that complied both with the Voting Rights Act and with all applicable provisions of state law.

In the aforementioned stipulations, Appellants conceded that, as far as they were aware, county authorities had no discriminatory motive or purpose in adopting the historic county ordinances which are challenged in this action:

> Plaintiffs acknowledge that as of the date of this Stipulation they had not discovered any evidence that Monterey County's adoption of the municipal court judicial district consolidation ordinances had the purpose or the intent of denying or abridging the right to vote within the meaning of Section 5 of the Voting Rights Act.

Apx. 2a, at ¶ 3.[11]

On June 1, 1994, the court enjoined Monterey County from holding municipal court elections pending adoption and preclearance of an appropriate plan.

The County continued to fail to obtain preclearance of any election plan or to implement a precleared plan. The district court became concerned with the prolonged period in which voters had been deprived of their right to elect judges by virtue of the County's lack of success, and ultimately determined " . . . that [the court's] remedy must allow for an election pending implementation of a permanent legislative solution." *Lopez*, 871 F.Supp. at 1258. However, the court emphasized that this was merely a one-time, interim measure which in no way reduced the County's burden to devise, with plaintiffs, a satisfactory permanent legislative solution:

> The interim election plan shall call for a special election in 1995 that is not unduly intrusive on state

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[10] *See* fn. 6, *ante*.

[11] *See also* the court's November 1, 1995 order (Juris. Stmt., App. 3). ("Further, neither the plaintiffs nor the County suggest that there is any evidence of purposeful discrimination in the enacting of the consolidation ordinances.")

> law and policies and not unreasonably disruptive to the County's interests in effective and efficient delivery of municipal court services. Under the Supremacy Clause, the implementation of relief for a violation of the Voting Rights Act must take precedence over enforcement of state law that stands in the way of effective relief. *See Katzenbach* v. *Morgan*, 384 U.S. 641, 646-47 (1966). The terms of those elected, however, will expire on the first Monday in January 1997, *so that the County understands that it must have a permanent solution in effect by the time of the next general election or it will risk being without judges.*

Ibid.; emphasis added.

At the same time, the court expressly agreed with the State " . . . that any attempt to give the County approval to violate existing state law on a permanent basis is, at this time, beyond the scope of this court's function." *Id.* at n. 5. The court further acknowledged that, notwithstanding its one-time emergency election order, "ultimately an at-large system- . . . may prove, under the totality of circumstances, to be the best judicial election scheme." *Id.* at 1259. And, finally, with the exception of this single court-ordered emergency interim election,[12] the court renewed its injunction prohibiting the County "from holding elections for municipal court judges pending adoption and preclearance of a permanent plan or further order of this court." *Id.* at 1261.[13]

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[12] As the district court took pains to make clear, the one-time election which it ordered "*is not being implemented as a legislative solution* to the existing Voting Rights Act problem facing the County, but *is rather being implemented by the court as an interim, emergency solution to insure the voters' right to elect municipal court judges.*" *Lopez*, 871 F.Supp. at 1259, n.7; emphasis added.

[13] In an April 13, 1995 order, the court re-emphasized that the court-ordered election was intended only as a one-time emergency measure of very limited duration. There, the court granted the motion to intervene filed by Judge Sillman, Presiding Judge of the municipal court; however, the

The court's December 1994 order overrode contrary provisions in the California Constitution and required that an emergency election be conducted using what are, indisputably, race-based electoral districts. Thus, the court ordered a special election of municipal court judges in 1995 based on "the election plan set forth in the Second Stipulation presented to the court by Plaintiffs and the County on January 13, 1994" (*Lopez*, 871 F.Supp. at 1261), notwithstanding that this proposed "Municipal Court Division Plan" utilized election "sub-districts"[14] the boundaries of which were unabashedly crafted specifically to increase Latino voting strength,[15] and notwithstanding that the proposed Plan clearly conflicted with state districting policy in two respects: (a) it "included districts that split the City of Salinas" (*Id.* at 1258), in contravention of Article VI, Section 5 of the California Constitution; and (b) under the Plan, "a judge's jurisdictional

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court denied Judge Sillman's request to modify its election order by extending judicial terms:

> The court has considered the concerns raised by the County and Judge Sillman about the cost of conducting back-to-back elections in 1995 and 1996, the interference with judicial administration that could result therefrom, and the impracticability of the parties' reaching a permanent solution before 1996. On the other hand, *the court is reluctant and unwilling at this time to establish six-year terms under an election plan that is designed to be an emergency, temporary solution to a problem most appropriately addressed through legislative action.*

Apx. 7a-8a; emphasis added.

[14] Under the court's December 1994 order, the municipal court remained a single county-wide district for jurisdictional and administrative purposes, with judges thereof sitting over the entire county. However, that district was divided into four discrete race-based electoral sub-districts, for election purposes, with no requirement that judicial candidates reside in the sub-district in which they stood for election. *See Lopez*, 871 F.Supp. at 1255-1256; *and see* Parties' 2d. Stipulation, ¶¶ 4, 5, Apx. 3a-4a.

[15] *See* fn. 6, *ante*.

and electoral bases would not be coterminous," in contravention of Article VI, Section 16(b). *Ibid.*

On June 29, 1995, this Court filed its decision in *Miller*, 115 S. Ct. 2475. Prior to a scheduled September 28, 1995 status conference, the district court directed all parties to address, in their status conference statements, the impact of *Miller* upon the instant case. (Apx. 10a.) The parties did so, and, as noted above, it was during the September status conference that Doug Holland, Monterey County Counsel, pointedly admitted that the election areas proposed by the County in its Second Stipulation, and employed by the district court in its December 1994 emergency one-time election order, *were entirely race-generated*. (*See* fn. 6, *ante*)

On November 1, 1995, the district court issued its interlocutory Order Modifying Injunction – the subject of this appeal. Juris. Stmt., App. 1-9. There, the court observed that the validity of its previous emergency election order was at best questionable in light of this Court's decision in *Miller*: "The Supreme Court in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), has cast substantial doubt upon the constitutionality of extending the duration of the previously ordered emergency, interim plan, as that plan used race as a significant factor in dividing the County into election areas." Juris. Stmt., App. 3.

Noting that "*Miller* raises substantial doubt as to whether legislative division into race based districts or election areas can ever withstand constitutional scrutiny" (Juris. Stmt., App. 3), the court concluded "that it should allow a county-wide election of municipal court judges in 1996 but enjoin elections thereafter pending preclearance of a permanent plan that complies with the Voting Rights Act and state law." *Ibid.*[16] The court issued this modified injunction "[p]ursuant to its equitable power to effect a remedy," in light of the fact that a

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[16] In issuing this interim remedy, the district court also placed reliance upon the fact that "this litigation is not a Section 2 proceeding" (Juris. Stmt., App. 3, 7), and that there are no judicial findings that a county-wide election would have any discriminatory or retrogressive effect.

return to the status quo was not feasible. Juris. Stmt., App. 8.[17] The remedy fashioned by the court was consistent with normal districting principles and with other municipal court elections conducted in non-covered jurisdictions within the State. *See* Cal. Const., art. VI, § 16(b); *Koski v. James*, 47 Cal.App.3d 349, 354 (1975).

Also, in this same November 1, 1995 order, the district court joined the State of California as an indispensable party defendant, and reopened the threshold issues of Section 5 liability in the case. The court expressly invited the State to seek dismissal of the action on grounds not heretofore considered:

> The court also reconsiders its prior decision that the State should not be joined as an indispensable party. Since the State now argues that "in conducting municipal court elections, the County is not 'administering' its consolidation ordinances at all, but is instead 'administering' a *state statute* that defines the municipal court district to encompass the entire county," (State's Status Conference Memorandum, page 2, lines 12-14), the State clearly must be brought into this action in order to bring about a complete resolution of the issues. If the State believes that the County is only administering a State statute and that the failure to preclear the consolidation ordinances is of no significance, it can seek to lift the injunction and have this Section 5 litigation dismissed.

Juris. Stmt., App. 8; emphasis in original.[18]

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[17] The court's previous order had included the observation that county-wide elections might well be "the best judicial election system." *Lopez*, 871 F.Supp. at 1259. At that point, in 1994, the court declined to address the question, hoping that the County would formulate and preclear its own appropriate legislative solution. By November 1995, however, in the absence of a legislative solution and in light of *Miller*, the court felt impelled to craft a new injunctive order providing for an interim election.

[18] It is certainly questionable whether, after 1989, the County can be said to be "administering" its consolidation ordinances at all in the conduct

ARGUMENT

I. This Appeal is From an Interlocutory Injunctive Order Issued Prior to a Final Determination Whether Section 5 Has Been Violated

Initially, the State submits that the questions presented by this appeal are not substantial by virtue of the procedural posture in which Appellants appear. The appeal is taken at a very preliminary stage of the case, from an *interlocutory injunctive order* – not, as Appellants argue, from a court's "refusal" to provide injunctive relief. And, the principal issues in the case have not yet been determined in the district court, including, for example, whether plaintiffs' action is foreclosed by laches, and/or whether the action is rendered moot by superseding state law.[19] Thus, it has not yet been

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of municipal court elections. In 1989 – six years *after* adoption of the most recent challenged county ordinance (Ordinance No. 2930) and two years before initiation of the instant proceeding – the California Legislature amended Cal. Gov. Code § 73560 to declare that the Monterey County Municipal Court District "encompasses the entire County of Monterey." (Cal. Stats. 1989, ch. 608.) Hence, it can reasonably be argued that, at this late date, the County is "administering" the *state statute* in the conduct of its elections, not the earlier, superseded, county consolidation ordinances. The issue whether the State, which is not a section 5 covered jurisdiction, was required to preclear the 1989 statutory amendment has not been adjudicated.

[19] The State has also raised the question whether this action is further rendered moot by the U.S. Attorney General's determination not to interpose any objection to the County's consolidation ordinances. In a March 6, 1995 letter to Monterey County Counsel, DOJ notes that, among the "voting changes for the municipal court of Monterey County California" which were submitted to the Attorney General for preclearance – indeed, the first such submission listed – was: "1. the consolidation of the municipal and justice courts that existed on November 1, 1968, into a single municipal court with nine judgeships." That letter then expressly states that "[t]he Attorney General does not interpose any objection to the *municipal court consolidation*, the interim election plan, the districting plan (as modified), the term of office, the procedures for conducting a June 6 special primary and an August 1 special runoff, and the additional

determined whether Section 5 of the Voting Rights Act has any application whatsoever to elections for municipal court judges in Monterey County as administered under current state law and state constitutional provisions. This fact alone shows the appeal to be without substance. Appellants' action may ultimately be dismissed below, without any legal basis whatsoever for permanent injunctive relief.[20]

Furthermore, no court has yet considered the constitutional propriety of Monterey County's initial designation as a covered jurisdiction under Section 5. In *Miller,* this Court suggested that, absent strong evidence of discrimination, Congress' application of Section 5 restrictions and preclearance requirements to political subdivisions may well exceed Congress' power under § 2 of the Fifteenth Amendment and tread impermissibly upon the powers reserved to the States under the *Tenth Amendment*. Thus, the Court noted that Section 5 "was directed at preventing a particular set of invidious

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judgeship." *See* Juris. Stmt., App. 54; emphasis added. Despite the letter's rather straightforward language, appellants characterize this preclearance as "ambiguous," and, citing a subsequent letter from DOJ on November 13, 1995, they argue that the express preclearance of the consolidation ordinances was not intended and should be disregarded. Juris. Stmt. at pp. 12-13, 15-17; and App. 28-84.

The district court has not ruled on the effect of the March 6, 1995 preclearance letter, and the court made it expressly clear that it placed no reliance on that letter in issuing its November 1, 1995 interim election order. (*See* Juris. Stmt., App. 25.) Manifestly, such preclearance would serve to moot the need for further injunctive relief in appellants' Section 5 action, and would support the propriety of a county-wide election for municipal court judges. (*See* State's Answer to Complaint, Apx. 28a-29a.)

[20] As an independent ground for affirmance, Appellee submits that, under these circumstances, where no Section 5 violation has been found, it would arguably have been an abuse of discretion if the district court *had* prevented county-wide elections from going forward in 1996. *See Miller,* 115 S.Ct. at 2488 (federal courts' disruption of election schemes is a "serious intrusion onto the most vital of local functions"). Indeed, having reopened the liability issue, the court should have lifted its injunction altogether until a Section 5 violation, if any, is proven by the plaintiffs.

practices which had the effect of 'undoing or defeating the rights recently won by nonwhite voters.' " (*Ibid.*) The statute "was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." (*Ibid.*, quoting from *Beer v. United States*, 425 U.S. 130, 140 (1976).) The Court observed that, notwithstanding the Tenth Amendment, "[i]n *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), we upheld § 5 as a necessary and constitutional response to some states' 'extraordinary stratagems of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.' " (*See Miller*, 115 S.Ct. at 2493.) In its very next sentence, however, the Court indicated that the interests of *federalism* necessarily limit the extent to which Section 5 preclearance requirements may be justified:

> "But our belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this case."

Thus, there is a real question whether the Tenth Amendment prohibits application of Section 5 preclearance requirements where, as here, there was no predicate evidence of wrongdoing by the targeted political subdivision.[21]

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[21] Monterey County was made subject to federal preclearance requirements not because of any proven discriminatory intent or discriminatory effect, but rather merely by the *mechanical application* of Section 5 standards to happenstance. Thus, the County became a "covered jurisdiction" under Section 5 "on and after August 6, 1970," only because (1) on November 1, 1968, the California Constitution included a literacy test for voting that was applicable in *all* counties, including Monterey County, and (2) this fact coincided with a determination that less than 50% of the voting age residents in the County had voted in the November 1968 presidential election. *See* 42 U.S.C. § 1973b(b); 35 C.F.R. Part 51 (Appendix); 35 Fed.Reg. 12354 (July 24, 1970); 36 Fed.Reg. (No. 60) 5809 (Mar. 27, 1971). However, nearly six months *before* August 6, 1970, the California Supreme Court struck down as unconstitutional the very literacy test that was the basis for Monterey County's coverage under Section 5 of the Act. *Castro v. State of California*, 2 Cal.3d 223 (1970).

There is little likelihood that the test and the turnout were causally linked in any event. California's literacy test was applicable throughout the State, yet only two of California's 58 counties were deemed "covered" as a result of the 1970 amendments to the Voting Rights Act: Monterey County and Yuba County. 36 Fed.Reg. (No. 60) 5809 (March 27, 1971). This would suggest that factors other than racial or ethnic discrimination (e.g., alienage, military bases, prisons, migratory patterns, etc.) may have accounted for calculation of a "low voter turnout" in these counties. *Cf., Apache County v. United States*, 256 F.Supp. 903, 909-910 (D.C.D.C. 1966). Indeed, as the County stated in its Response to Appellants' Application for a Stay Pending Appeal, at p. 2, in 1968 Monterey County contained both the Fort Ord Army Base and the Naval Post Graduate School, as well as a state prison "housing several thousand convicted felons who [were] ineligible to vote." According to the 1960 Census, Fort Ord itself accounted for 32,723 of the County's total population of 198,351. *Id. at fn. 1.*

II. Even if the Court's Injunction Could Accurately Be Described as a Refusal to Intervene, Such A Remedy Would Be Appropriate in the Extreme Circumstances Presented Here

Although the election order from which this appeal is taken is plainly a modified injunction issued pursuant to the district court's remedial powers, Appellants insist upon characterizing it instead as a "failure to enjoin" the County's unprecleared election changes. Even if that characterization were accurate, however, the order would merit affirmance – particularly in view of the fact that the district court has not yet determined whether Section 5 has been violated.

Appellants argue, and the State concedes, that interdiction of an unprecleared voting practice, with perpetuation or resumption of the status quo, is the usual remedy for a failure of preclearance. (*See, e.g., Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096 (1991).) Here, of course, it remains to be seen whether the county-wide election of municipal court judges is in fact an "unprecleared voting practice" in violation of Section 5. Moreover, even putting that fact aside, injunctive

relief is not *always* a necessary remedy. (*Id.* at 654, 2102 ["We need not decide today whether there are cases in which a District Court may deny a § 5 plaintiff's motion for injunction and allow an election for an unprecleared seat to go forward."]) And, as Appellants concede, the Court in *Clark* suggested that it would be appropriate to permit implementation of such an unprecleared election change in "extreme circumstances." *Ibid. And see* Juris. Stmt. at p. 18. Hence, even if, arguendo, the district court's November 1995 order could fairly be categorized as a refusal to enjoin unprecleared election changes, the "extreme circumstances" test suggested in *Clark* is plainly met here in light of the unique posture of this case.

A. The Absence of Ascertainable Harm

Unless and until the court below determines that Section 5 in fact applies here and that preclearance requirements have not been met, there is no demonstration of "harm" which would warrant injunctive relief. Appellants protestations to the contrary are, at this point, necessarily conjectural.

Further, the Court in *Clark* was not presented with the question of the constitutional propriety of *presuming*, as a basis for issuing an injunction against an unprecleared enactment, that state (or county) governments engage in race-based discrimination. However, the issue whether broad application of such a presumption is acceptable was certainly raised in *Miller*, where this Court considered the Justice Department's proposition that Georgia's failure to *maximize* minority voting strength was tantamount to discrimination. The Court warned that "the Justice Department's implicit command that States engage in presumptively unconstitutional race-based discrimination brings the Voting Rights Act, once upheld as a proper exercise of Congress' power under § 2 of the *Fifteenth Amendment* . . . into tension with the *Fourteenth Amendment*." (*Miller*, 115 S.Ct. at 2493, emphasis added. *And see* discussion of purpose of Section 5 in Argument I, pp. 15-16, *ante*.) Here, the State submits that the application of Section 5 to enjoin county-wide municipal court elections *in this case* is so

far divorced from the purposes underlying the Voting Rights Act as to raise serious questions whether any relief can be afforded Plaintiffs that is consistent with the Fourteenth Amendment – even if there is ultimately a final determination that Section 5 has been violated. After all, as noted in footnote 21, *ante*, Monterey County became a "covered jurisdiction" under Section 5 only by virtue of coincidence, and the California Supreme Court had struck down the offending statewide literacy test nearly six months *before* the County's period of Section 5 coverage began. Indeed, the California Supreme Court's ban on literacy tests antedated the *federal* ban on such tests by three months.[22] So, unlike states which sought to *counter* federal court remedies with new obstacles to voting, California courts *anticipated* federal policies and *struck down* the offending literacy test *even before any political subdivision of the State became a covered jurisdiction.* Hence, this case presents a very different context from that addressed in *Katzenbach*.

Furthermore, the "voting practice"[23] at issue here developed as a series of consolidations over a period of 20 years,

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[22] The Voting Rights Act did not ban literacy tests outright until June 22, 1970. (*See* 42 U.S.C. § 1973aa; Pub. L. 89-110; *and see, generally, Oregon v. Mitchell*, 400 U.S. 112 (1970).)

[23] The State does not concede that the consolidation of justice court districts into municipal court districts is a "qualification, standard, practice, or procedure" within the meaning of Section 5 of the Voting Rights Act. The Voting Rights Act guarantees *equal* voting opportunities, without regard to race or ethnicity. However, the requirement that electoral districts be equipopulous – necessary for any rational determination whether voting rights are, in fact, equal – *does not apply to judicial districts.* (*Wells v. Edwards*, 347 F.Supp. 453, 454 (M.D.La. 1972), *aff'd*, 409 U.S. 1095 (1973).) Latino voters benefitted greatly from this anomaly, since they were able to constitute "majority" voting constituencies in three or four very small rural justice court districts in the County in 1968. For example, Latino residents make up 76% of the former Gonzales justice court district, but the total population of that district, adjusted to reflect 1990 census figures, is only 7,880 residents. (*See* Apx. 14a) In contrast, Latinos constitute only 40% of the total population, and only 23% of qualified voters, in the former Salinas municipal court district, which has a total of

with state legislative ratification and, on occasion, as a *direct result* of state legislative action. There is no evidence whatsoever that this evolution was motivated by anything other than a desire to improve the effective and efficient administration of justice in Monterey County, as Appellants have conceded.[24]

There can be no ascertainable "dilutional" *effect* of the consolidations because, as has been discussed, in the wake of *Wells v. Edwards*, 347 F.Supp. 453, 454 (M.D.La. 1972), *aff'd*, 409 U.S. 1095 (1973) there is no standard based on equal population against which vote dilution might fairly be measured. (*See* fn. 23, *ante*.) And, as Appellants have stipulated, there is no evidence of intentional discrimination in the history of the consolidation. Accordingly, there would appear to be no *Fifteenth Amendment* justification for enjoining county-wide municipal court elections based upon any *presumption* of prohibited discrimination by the County. In such a circumstance, interdiction of county-wide elections in favor of *any device or plan* that increases existing Latino voting strength relative to non-Hispanics in the County runs afoul of the *Fourteenth Amendment*. (*And see* Argument IV, *infra*.)

Furthermore, disruption of a long-standing municipal court election scheme is a "serious intrusion onto the most vital of local functions" (*Miller*, 115 S.Ct. at 2488), and

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146,858 residents – nearly *19 times the population of the Gonzales district*. (*Ibid.*) Because the County's 1968 judicial districts were not equipopulous, the *true* relative voting strength of Hispanic and non-Hispanic voters within the County cannot be established. And, there being no *norm* by which to measure what Latino voting strength *should have been* in 1968, as compared with non-Hispanics within the County, a *change* in district lines, *standing alone*, cannot be said to affect the "equality of voting rights" guaranteed by the Voting Rights Act. When the "baseline" judicial districts are not even close to equipopulous, "[h]ow does one begin to decide . . . how much elective strength a minority bloc *ought* to have?" (*See, Chisom v. Roemer*, 501 U.S. 380, 415, 111 S.Ct. 2354, 2375 (1991) (Scalia, J., dissenting; italics in original).) This issue has not been addressed by the district court.

[24] *See* Parties' 2d. Stipulation at ¶ 3 (Apx. 2a.)

"[f]ederal courts may not . . . alter the state's form of government itself when they cannot identify 'a principled reason why one [alternative to the model being challenged] should be picked over another as a benchmark for comparison." (*Nipper v. Smith*, 39 F.3d 1494, 1532, (11th Cir. 1994), cert. denied, 115 S.Ct. 1795 (1995)[25], citing *Holder v. Hall*, ___ U.S. ___, 114 S.Ct. 2581, 2586 (1994); *see also, League of United Latin American Citizens v. Clements*, 999 F.2d 831, 871 (5th Cir. 1993), cert. denied, 114 S.Ct. 878 (1993) [weight of Texas' interest in scheme for judicial elections is a function of its sovereign prerogatives]; *accord, Republican Party of North Carolina v. Hunt*, 991 F.2d 1202, 1208 (4th Cir. 1993) (Phillips, J., dissenting from denial of rehearing *en banc*).)

B. The Unique Combination of Circumstances Weighs Against Enjoining County-Wide Elections

Here, the intrusive effect of a federal court order would be particularly evident. To be sure, the district court has already determined that the County failed, decades ago, to preclear its historical consolidation ordinances. But even if that finding were dispositive of the Section 5 question here (and it plainly is not), the State respectfully submits that, given the circumstances of this case, *there may be no remedy*, apart from county-wide elections, that would be consistent with the Fourteenth and Tenth Amendments.

The unique and extreme circumstances presented in this case include: (1) plaintiffs' protracted and unexplained delay in bringing their Section 5 action;[26] (2) the absence of a corollary Section 2 action; (3) Appellants' concession that

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[25] In *Nipper*, the Eleventh Circuit held, en banc, that relief will be denied to a Section 2 plaintiff challenging judicial elections if the remedies sought would undermine the court's ability to administer justice.

[26] Courts may consider the undue passage of time as a factor in determining an appropriate temporary remedy. *Lopez v. Hale County, Texas*, 797 F.Supp. 547, 550-551 (N.D.Tex. 1992), *aff'd.*, 113 S.Ct. 954 (1993).

there is no evidence of discriminatory purpose underlying the historical consolidation ordinances; (4) the interlocutory, one-time nature of the injunctive order from which the appeal is taken; (5) the fact that "[a] return to the status quo that existed before the enactment of the consolidation ordinances is not legal, feasible, or desired." (Juris. Stmt., App. 3; and see *Lopez*, 871 F. Supp. at 1257 and fn. 3); (6) the fact that, in conducting its judicial elections, the County may be administering intervening state statutes and constitutional provisions, rather than county ordinances; (7) the fact that the district court has not yet finally determined whether Section 5 applies to the challenged judicial election system; (8) the fact that the State has newly been added as a defendant and is free to raise new defenses on the merits of Appellants' claim, which may lead to outright dismissal of the action; (9) the fact that Appellants have not challenged the configuration of Monterey County;[27] (10) the fact that the historical consolidation ordinances have never been determined to be retrogressive and that, because of extreme disparities in the respective populations of 1968 judicial districts, such an analysis would be highly complex if not impossible;[28] (11) the possibility that

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[27] As the district court observed in its November 1, 1995 order, the municipal court judges whose election is at issue here serve the entire county (unlike the justice court and municipal court judges who, in 1968, were *elected* from smaller districts within the County *but also sat only in those smaller districts*), "and no claim is made that the County itself was configured to deprive any racial or ethnic group of voting power." Juris. Stmt., App. 6. Furthermore, the California Constitution, Article VI, Section 16(b), reflects a state interest in having its judges' jurisdictional and electoral bases be coterminous.

[28] In light of the fact that the County's consolidation ordinances have never been shown to have any discriminatory effect, combined with appellants' admission that there is no evidence of discriminatory intent, not to mention the fact that there is no determination of a Section 5 violation, the argument asserted by appellants at page 23 of their Jurisdictional Statement – about the necessity for remedies which address the "discriminatory features" of a challenged system, or the "dilution of minority voting strength," or the "discriminatory effects of the past" – plainly has no application here.

the County's challenged ordinances may already have been precleared by the U.S. Attorney General in March 1995; (12) the fact that the County became a covered jurisdiction through mechanical application of a statutory formula, with no finding of unlawful purpose or discriminatory effect; and (13) the fact that the previous race-based court-ordered election plan of December 1994 is manifestly unconstitutional under *Miller*, having both an exclusively discriminatory purpose and a radically discriminatory effect. *See* Argument IV, *infra*.

Under these unprecedented circumstances, therefore, where the plaintiffs delayed so long in bringing their Section 5 action and in insisting upon preclearance, and where a return to the status quo ante has become unfeasible, Section 5 simply does not work as an appropriate vehicle for obtaining injunctive relief. That conclusion does not leave the plaintiffs completely without a remedy, however; rather, such plaintiffs remain free to seek their remedies, if any, under *Section 2* of the Voting Rights Act. If such an action were brought, the plaintiffs would have a full opportunity to attempt to *prove* that the consolidation of justice court districts and/or municipal courts has had a prohibited discriminatory effect on Latino voting rights.[29]

III. Appellants' Proffered Remedial Authorities Are Inapposite

Appellants cite numerous cases to this Court for the proposition that the district court is required to enjoin county-wide judicial elections if the Act is to be effectively enforced. Juris. Stmt. pp. 13-15. Those authorities may readily be distinguished, however. First, Appellants' cases all concern remedies issued *after the courts had determined that Section 5 preclearance was required and had not been obtained*,

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[29] In any event, future elections conducted on a county-wide basis should not be interdicted unless there is a determination that, in conducting those elections, the County would be "administering" an election district configured by county ordinance and not by statute.

whereas here, as noted above, that elemental question remains unresolved. This distinction, alone, renders the cases inapposite. Second, none of Appellants' authorities involved a challenge which, as here, was limited to legislation which *had already been operative for 8 to 20 years before the Section 5 complaint was filed*, and none concerned a situation in which, as here, *it was not legal or feasible to return to the status quo*. Moreover, several of the cited cases also included alleged Section 2 violations or other indices of unlawful purpose by the covered jurisdiction. *See, e.g., Katzenbach*, 86 S.Ct. at 822 (Section 5 coverage and preclearance requirements justified because "some of the States . . . had resorted to the extraordinary stratagems of contriving new rules of various kinds *for the sole purpose of perpetuating voting discrimination* in the face of adverse federal court decisions" [emphasis added]); *Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817 (1969) (Suits brought in 1966 and 1967 to challenge 1966 amendments to Mississippi Code and 1965 directive to Virginia registrars); *Perkins v. Matthews*, 400 U.S. 379, 91 S.Ct. 431 (1971) (Action filed in 1969 to enjoin 1969 election requirements which differed from those in effect for the most recent previous election (in 1965)); *Georgia v. United States*, 411 U.S. 526, 93 S.Ct. 1702 (1973) (1972 suit to enjoin 1972 reapportionment plan); *Connor v. Waller*, 421 U.S. 656, 95 S.Ct. 2003 (1973) (1975 suit challenging 1975 Mississippi reapportionment enactments); *U.S. v. Board of Supervisors*, 429 U.S. 642, 97 S.Ct. 833 (1977) (1973 suit to enjoin 1970 redistricting plan following U.S. Attorney General's post-1971 refusal to preclear the plan or to withdraw previous objections thereto); and *N.A.A.C.P. v. Hampton County Election Com'n.*, 470 U.S. 166, 105 S.Ct. 1128 (1985) (1983 suit to enjoin changes made in early 1983 respecting a March 1983 election).

Accordingly, these authorities provide no guidance in the unique circumstances presented here, where the question of Section 5 *liability* is yet unresolved, where the challenged

ordinances were implemented long ago, and where the passage of time has made a return to the 1968 status quo impossible.[30]

IV. In Any Event, The Interim Order Directing County-Wide Elections is Consistent With Section 5 Standards; And, The Court's Previous Race-Based Election Plan is Unconstitutional and is Not a Valid "Benchmark"

Appellants further argue that the district court improperly disregarded "the retrogression standard" by ignoring the alleged "benchmark" status of its December 1994 emergency order. They contend that the court's December 20, 1994, one-time, emergency, interim election order, which was expressly and emphatically not a legislative plan or a legislative solution,[31] must nonetheless be considered as the new starting

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[30] As noted above, justice courts were eliminated in the State of California by 1994 constitutional amendment. Even in the absence of that amendment, however, all parties and the district court had agreed that it would be unduly costly and administratively impractical to attempt a return to the 1968 system of disparately sized justice and municipal courts. *Lopez*, 871 F.Supp. at 1257 and n. 3. Of course, plaintiffs' opposition to the traditional status quo remedy may also have stemmed from their realization that they might achieve drastic and unsupportable *increases* in Latino voting strength, *far beyond 1968 levels*, through stipulations with the County. *See* Apx. 14a-15a; 20a-21a at fn. 3.

[31] In its December 20, 1994 decision, the court specifically limited the scope and impact of its election order: "*[T]he plan is not being implemented as a legislative solution* to the existing Voting Rights Act problem facing the County, but is rather being implemented by the court as an interim, emergency solution to insure the voters' right to elect municipal court judges." *Lopez*, 871 F.Supp. at 1259, n.7; emphasis added. Further, the court clearly stated that it did not approve or endorse the merits of the one-time plan: "The court does not intend by this order to pass judgment on the merits of the proposed election area plan as a potential permanent plan. That judgment is best left to legislators." *Id.* at 1261, n.8. And, it must be remembered that the district court *flatly rejected* the same race-based plan when it *was* submitted, in the County's Second Stipulation, as a *legislative solution*. *See Id.* at 1257.

point for measuring retrogression in any future plan. Appellants assert that the concededly race-based plan is the " . . . last legally enforceable practice or procedure used by the jurisdiction," within the meaning of 28 C.F.R. § 51.54(b). *See* Juris. Stmt., pp. 25-29. Their claim is quite without merit.

Appellants' theory would permit them to "hijack" the court's race-based one-time emergency order – which, as the State showed below, arbitrarily and radically realigned minority and non-minority voting strengths from the 1968 status quo[32] – and convert it into, essentially, a permanent legislative plan from which there is no going back. Their argument ignores the fact that the court's one-time emergency order cannot be deemed a "legally enforceable practice or procedure used by [the County]" because, as the district court noted, the race-based scheme squarely violated two provisions of the California Constitution. *See* Juris. Stmt., App. 7. While the *district court* may have the power to suspend state constitutional provisions, the *County* plainly has no authority whatsoever to defy or to override limitations imposed upon it by the State's Charter. *See* Cal. Gov. Code, §§ 23002, 23012; *Richter v. Board of Supervisors*, 259 Cal.App.2d 99, 105 (1968); 68 Ops.Cal.Atty.Gen. 175, 177-178 (1985).

Appellants' argument also ignores the fact, made abundantly clear in *Miller*, that the interim race-based court-ordered plan – the purpose of which, the County later admitted, was *exclusively* discriminatory – is itself unconstitutional under the Fourteenth Amendment and violates both the letter and spirit of the Voting Rights Act. Hence, once again, the district court's previous order cannot be deemed a "legally enforceable practice or procedure." The County could never have lawfully promulgated or implemented such a plan.

Indeed, this 1994 court-ordered election system had not only a discriminatory *intent*, but a dramatically discriminatory *effect*, as well, when compared to 1968 conditions. The 1994 race-based plan radically increased Latino voting strength

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[32] See discussion, *infra*, at pp. 26-27 and fn. 33; and see Apx. 14a-15a; 20a-21a at fn. 3.

from the 1968 status quo, as measured by the percentage of total county population included in "majority-minority" electoral districts under the respective election schemes. Depending on how voting majorities are calculated, this percentage of population within majority-minority districts jumped from 10.63 percent to 27.42 percent (when "majority-minority" is measured by percentage of Latino *adults* in districts) or from 7.53 percent to 20.09 percent (when "majority-minority" is measured by percentage of Latino *adult citizens* in districts) under the December 1994 race-based plan. In either case, the discriminatory effect of the change was, obviously, enormous (*see* September 29, 1995 letter to district court, p. 3, n.3. [Apx. 20a at fn.3]) – even if one ignores the further gains in Latino voting power attributable to the *greatly expanded jurisdiction* accorded to current judges.[33] *See* Apx. 14a-15a. This arbitrary and drastic discrimination would be perpetuated forever if the race-based plan were treated as a "benchmark."

Finally, Appellants' argument ignores several significant distinctions between the instant circumstances and the cases upon which they rely. Appellants cite *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981); *State of Texas v. United States*, 785 F.Supp. 201, 204-205 (D.D.C. 1992); *State of Mississippi v. Smith*, 541 F.Supp. 1329, 1333 (D.D.C. 1982), *appeal dismissed* 461 U.S. 912 (1983); and *State of Mississippi v. United States*, 490 F.Supp. 569, 582 (D.D.C. 1979), *sum. aff'd.*, 444 U.S. 1050 (1980), for the proposition that the December 1994 one-time emergency order is somehow automatically converted into the foundational benchmark for future retrogression analysis. However, those cases manifestly

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[33] In 1968, the County's justice court judges sat only over those districts in which they were elected; hence, judges elected in majority-minority districts *presided over only 7.53 or 10.63 percent of the County's population*, depending on the measure used. Apx. 14a. Under the December 1994 plan, this was increased astronomically: judges elected in the expanded race-based majority-minority districts now sit as judges of a single county-wide municipal court district (*see* Cal. Gov. Code § 73560), *presiding over 100 percent of the County's total population!*

have no application here, where there is no showing of retrogression, where the county consolidation ordinances have never been alleged to be, much less proven to be, unconstitutional, and where the court below has expressly stated that the plan *appears to violate the Fourteenth Amendment* in the light of *Miller*.

In *State of Texas v. United States*, 785 F.Supp. 201 (D.D.C. 1992), the court treated as a new benchmark an ongoing state legislative redistricting plan which had been carefully fashioned by a three-judge federal court and had been specifically deemed by that court to be "valid and equitable": "[The three-judge court] entered judgment 'to provide for a valid and equitable interim state legislative redistricting plan in the current circumstances in which no valid plan exists under federal law.' " *Id.*, at 203. In *State of Mississippi v. Smith*, 541 F.Supp. 1329 (D.D.C. 1982), too, the benchmark references were to a court-ordered reapportionment plan that the three-judge court was confident had been necessary and valid for state compliance with the Voting Rights Act, and the plan had been imposed by the court for an indefinite duration. It was to "remain[] in effect until a redistricting plan enacted by the State of Mississippi is precleared . . . " *Id.*, at 1332. And in *State of Mississippi v. United States*, 490 F.Supp. 569 (D.D.C. 1979), the court-ordered reapportionment plan cited as a new benchmark was a plan which the court and the parties had developed, through a long and painstaking process, and which the court adopted pursuant to instructions from the Supreme Court. *Id.*, at 571-574.

Here, in contrast, the district court did not itself fashion any plan (except to shorten terms of office), the court expressly *rejected* the County's legislative plan as invalid (i.e. devoid of any showing that it was necessary or appropriate to violate state districting principles in the manner proposed), the court expressly refused to approve or endorse the merits of the proposed plan, the court later noted that the plan apparently violated the Fourteenth Amendment, and the plan is concededly based exclusively on racial considerations. The court made use of the pre-*Miller* race-based plan *only on a*

one-time basis, with uniquely short terms for judges elected thereunder, out of frustration at the voters' long wait for appropriate action by the County. And in doing so, *the court specifically held that the emergency order would have no precedential effect*, noting that "ultimately an at-large system or a system different from either of the two proposed alternatives may prove, under the totality of circumstances, to be the best judicial election system." *Lopez*, 871 F.Supp. at 1259.

In short, there is no valid comparison between the instant circumstances and the cited cases, and it would be neither appropriate nor constitutionally permissible to treat the court's one-time race-based emergency order on a par with the judicial remedies considered in those cases.[34] Appellants' argument was properly rejected by the three-judge court:

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[34] Nothing in the case of *McDaniel*, 452 U.S. 130, 149 (1981), or in the U.S. Attorney General's regulations (*see* 28 C.F.R. § 51.54(b)) remotely suggests that it is appropriate, much less required, to recast the district court's carefully limited one-time emergency order – a race-based plan which was judicially rejected when proffered as a legislative solution – into a permanent standard against which any and all future election plans must be measured. Indeed, appellants' reliance on *McDaniel* is quite misplaced. *McDaniel* addresses the status of "redistricting [which] is ordered by a federal court *to remedy a constitutional violation that has been established in pending federal litigation.*" (*Id.* at 148; emphasis added.) Here, in contrast, plaintiffs have not even alleged, much less established, a "constitutional violation;" their complaint is grounded exclusively on an alleged *technical* failure to obtain preclearance decades ago – a failure not yet conclusively shown to be relevant. Indeed, the only constitutional violation before the Court here is the discriminatory, race-based, December 1994 court-ordered election which appellants now seek to perpetuate.

Connor v. Finch, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834 (1977) likewise supports affirmance here. In *Connor*, the Court emphasized that district courts' remedial orders must be achieved "free from any taint of arbitrariness or discrimination." That is precisely what the court below endeavored to do through its November 1, 1995 election order, by putting an end to *the concededly discriminatory and undeniably arbitrary 1994 election scheme* which is now championed by appellants. The consolidated municipal court and the county-wide election scheme, in contrast, have

> The court doubts whether the prior interim plan can be considered 'legally enforceable' within the meaning of [28 C.F.R. § 51.54(b)], because it suspended otherwise applicable provisions of state law and was adopted only on an emergency basis. Further, given the reasoning of *Miller*, the court cannot say that a county-wide election plan is necessarily unlawfully retrogressive in comparison with the prior plan or the system in effect prior to the consolidation ordinances.

Juris. Stmt., App. 7.

CONCLUSION

For the foregoing reasons, Appellee State of California respectfully submits that the November 1, 1995 interlocutory injunctive order below, directing that 1996 elections for municipal court judges in Monterey County be conducted on a county-wide basis, should be affirmed, or, alternatively, that Appellants' appeal from that interlocutory injunctive order should be dismissed.

Dated: February 28, 1996.

Respectfully submitted,

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never been shown to be anything but fair, good faith efforts to achieve efficiencies and economies in the administration of justice while conforming to normal state districting principles.

INDEX TO APPELLEE'S APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, JESSE G. SANCHEZ, and DAVID SERENA,	)	
Plaintiffs,	)	Civil Action No. C-91-20559-RMW (EAI)
v.	)	
MONTEREY COUNTY, CALIFORNIA,	)	Voting Rights Action Three Judge Court
Defendant,	)	
STATE OF CALIFORNIA,	)	
Defendant-Intervenor.	)	

PARTIES SECOND STIPULATION AND COURT ORDER

The Plaintiffs, Vicky M. Lopez, *et al.*, and Defendant Monterey County, California in order to permit the adoption of an election system for the election of Municipal

Judges to the Monterey County Municipal Court District hereby stipulate as follows:

1. Both the Plaintiffs and the Defendant want to settle this litigation to enforce Section 5 of the Voting Rights Act and avoid any future litigation.

2. As a result of this Court's Order dated March 31, 1993, Defendant Monterey County was required to submit municipal court judicial district consolidation ordinances, which were adopted between 1968 and 1983, for approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c. As a result of this Court's Order, Monterey County filed a declaratory judgment action pursuant to Section 5 seeking judicial approval of these consolidation ordinances. *Monterey County v. United States of America*, Civil Action No. 93-1639 (CRR) (D.C.Dist.Colum. 1993). By an Order filed on September 7, 1993, the United States District Court for the District of Columbia permitted the Plaintiffs in this action to intervene as defendants-intervenors in the *Monterey County v. United States of America* action.

3. Plaintiffs acknowledge that as of the date of this Stipulation they had not discovered any evidence that Monterey County's adoption of the municipal court judicial district consolidation ordinances had the purpose or the intent of denying or abridging the right to vote within the meaning of Section 5 of the Voting Rights Act. Monterey County, however, stipulates that it is unable to establish that these ordinances did not have the effect of denying the right to vote to Hispanics in Monterey County due to the retrogressive effect several of these ordinances had on Hispanic voting strength in Monterey

County. For this reason, Monterey County agreed not to enforce these municipal court judicial district consolidation ordinances in future elections for the Monterey County Municipal District Court. As a result of this agreement, the United States of America, Monterey County, and the *Lopez, et al.*, defendants-intervenors stipulated to a dismissal of the action in the District of Columbia federal court.

4. Monterey County and the Plaintiffs in this action have agreed to the implementation of an election system for the election of municipal court judges to the Monterey County Municipal Court District. This agreement only affects the electoral process and does not affect a municipal court's countywide jurisdiction. Both the Plaintiffs and the Defendants agree that the Monterey County Municipal Court District shall be divided into four divisions. For the purpose of election of judges, the term "division" as used in this stipulation and proposed Court Order is and shall continue to be the "district" referred to in subdivision (b) of Section 16 of the Article VI of the Constitution of the State of California. Except as otherwise expressly provided in this paragraph, the term "district" as used in this stipulation and proposed Court Order shall mean a countywide municipal court district and shall be the "district" referred to in Section 5 of Article VI of the Constitution of the State of California and Chapters 6 and 8 of Title 8 of the Government Code of the State of California.

5. Both Monterey County and the Plaintiffs believe that if this Court does not approve and issue the Order as proposed, Monterey County will not be able to adopt and implement any election system for municipal court

judges which will secure the necessary approval pursuant to Section 5 of the Voting Rights Act. Should Monterey County not be permitted to implement a Municipal Court Division Plan which secures the requisite Section 5 approval, then this Court will be faced with the task of fashioning a court-ordered plan. In order to avoid any additional expenditure of judicial resources, Monterey County and the Plaintiffs have agreed to the implementation of a Municipal Court Division Plan, as generally described in the proposed Order, which will secure the requisite Section 5 approval. Any conflict between any California law and the provisions of this order should be resolved in favor of the Order, in order to ensure full compliance with the Voting Rights Act.

6. Monterey County seeks to have in place a Municipal Court Division Plan for the election of municipal judges to the Monterey County Municipal Court District in time for the commencement of the June 1994 election process, at least insofar to ensure elections in two of the proposed divisions. The Plaintiffs and Monterey County have previously provided the Court with an amended election schedule which will permit the June 1994 election process to proceed.

7. Monterey County will seek Section 5 approval of the Municipal Court Division Plan, consistent with the Order, from the United States Attorney General. Representatives from the United States Attorney General have informed us that expedited review of the Municipal Court Division Plan submission will be given serious consideration to accommodate the impending election schedule. In view of the impending election schedule, Monterey County will submit a Municipal Court Division

Plan to the United States Attorney General for expedited review. Once Section 5 approval is secured, the Municipal Court Division Plan can be implemented in time for the June 1994 elections. Should this Court not grant the requested Order, then proceedings should be initiated for the implementation of a court-ordered plan and an appropriate election schedule.

DATED: January 13, 1994

JOAQUIN G. AVILA
BARBARA Y. PHILLIPS

By: /s/ Joaquin G. Avila
JOAQUIN G. AVILA
Attorney for Plaintiffs

DATED: January 13, 1994

DOUGLAS C. HOLLAND

By: /s/ Douglas C. Holland
DOUGLAS C. HOLLAND
Attorney for defendant Monterey County

ORDER

Based upon the Parties Stipulation, this Court hereby ORDERS Monterey County to adopt and implement a Municipal Court Division Plan for municipal court judges which will secure the requisite approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c. Monterey County has stipulated that the municipal court judicial district consolidation ordinances, which are the

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VICKY LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, JESSIE G. SANCHEZ, and DAVID SERENA, Plaintiffs, v. MONTEREY COUNTY, CALIFORNIA, Defendant.	NO. C 91-20559-RMW (EAI) ORDER GRANTING MOTION TO INTERVENE AND DENYING MOTION TO MODIFY ORDERS DATED DECEMBER 20, 1994 AND JANUARY 10, 1995 (Filed April 13, 1995)

On March 10, 1995, Judge Stephen A. Sillman, Presiding Judge of the Monterey County Municipal Court ("Municipal Court"), moved to intervene in his official capacity in this action for the purposes of (1) seeking modification of the court's December 20, 1994 and January 10, 1995 orders (collectively, "the Election Order") and (2) representing the interests of the Municipal Court in future proceedings. Under the modification proposed by Judge Sillman, the terms of office of those elected in 1995 pursuant to the Election Order would be extended from one year to six years retroactive to 1994. The court set March 29, 1995 as a deadline for responses from any party wishing to either respond to Judge Sillman's motion to intervene or independently move for a modification of the Election Order.

Plaintiffs and the State of California have filed statements of non-opposition to Judge Sillman's proposed

intervention and modification of the Election Order. The United States has filed a response in which it urges the court to defer an extension of terms until a later date, the United States does not appear to oppose Judge Sillman's proposed intervention. Defendant Monterey County ("the County") has filed both a motion to modify the Election Order in accordance with Judge Sillman's proposal and an opposition to Judge Sillman's motion to intervene.

In light of Judge Sillman's interest in the efficient administration of the Monterey County Municipal Court, the court grants his motion to intervene in his official capacity as Presiding Judge of the Municipal Court. Judge Sillman's participation in this action is not precluded by the holding in *League of United Latin American Citizens v. Clements*, 884 F.2d 185 (5th Cir. 1989), where the judges seeking to intervene asserted an interest in the "legislative action" of redistricting, *id.* at 188. Here, by contrast, Judge Sillman is seeking to protect the administration of justice in Monterey County, a concern independent from an interest in the configuration of particular districts.

Additionally, the court denies without prejudice the County's motion to modify the Election Order to extend the terms of those elected in 1995. The court has considered the concerns raised by the County and Judge Sillman about the cost of conducting back-to-back elections in 1995 and 1996, the interference with judicial administration that could result therefrom, and the impracticability of the parties' reaching a permanent solution before 1996. On the other hand, the court is reluctant and unwilling at this time to establish six-year terms under an

election plan that is designed to be an emergency, temporary solution to a problem most appropriately addressed through legislative action.

The court hereby sets a status conference for September 28, 1995 at 1:30 p.m. At least five days before the status conference, each party shall file a statement showing:

(1) what efforts have been made to implement a permanent solution;

(2) whether a permanent plan will be in effect for the 1996 general election; and

(3) if a permanent plan will not be in effect in 1996, when such implementation is anticipated.

Copies of each party's statement should be sent directly to the chambers of each of the judges on the panel.

DATED: 4/10/95

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge
On Behalf of the Panel

Copy of Order mailed on 4/13/95 to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Vicky M. Lopez et al., Plaintiffs, v. Monterey County, California, Defendant. State of California Intervenor-Defendant	NO. C-91-20559 RMW(EAI) Order Re Briefing for Status Conference (Filed Sep. 7, 1995)

The parties are hereby requested to brief the effect of *Miller v. Johnson*, 95 Daily Journal D.A.R. 8495 on this case in their status conference statements for the status conference on September 28, 1995 at 1:30 p.m.

DATED: 9/6/95

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge
On Behalf of the Panel

COPY

Pages 1-56

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLES
RONALD M. WHYTE, JUDGE
THE HONORABLE MARY SCHROEDER, JUDGE
THE HONORABLE JAMES WARE, JUDGE

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, JESSE G. SANCHEZ, AND DAVID SERENA, Plaintiffs, vs. MONTEREY COUNTY, CALIFORNIA, Defendant.	Case No. C-91-20559

Thursday, September 28, 1995
San Jose, California

Reporter's Transcript of Proceedings

APPEARANCES

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Reported by
Lee-Anne Shortridge
Certified Shorthand Reporter #9595

Appearances Continued on Next Page

Computerized Transcription by StenoCat

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For the Intervenor
Judge Stephen A. Sillman
Nielsen, Merksamer, Parrinello,
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Marguerita Mary Leoni,
Attorney at Law
591 Redwood Highway, Suite 4000
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* * *

[p. 16] that bothers me. I'm very scared as to what that does to the County in trying to go back to that situation. Clearly when you hear the State make that argument, that's a possibility that is out there, and that's the reason, that's one of the reasons, why the County was very apprehensive about attempting to secure preclearance knowing that some of them we could get precleared, other ones, we were not convinced we could do so.

JUDGE WHYTE: Do you feel the *Miller versus Johnson* case raises some questions about the constitutionality of the plan that was approved as an interim emergency plan?

MR. HOLLAND: No, I do not, Your Honor.

JUDGE WHYTE: And the reason?

MR. HOLLAND: The reason is it was an interim remedy to deal with a specific situation. I will be the first one to admit the reasons for the rationale for the boundaries were in fact race generated. There's no question about it. That was the sole motivation. Nothing else went into those considerations. To the extent any other factor went in, it was entirely secondary. There's no question about that.

But I think that it was also necessary in order to resolve a particular problem that we were in at that time. We were looking at, quite frankly, again, looking at what the status quo ante is. Status quo ante is in a multi-district court system that would have had four minority, or four

* * *

Estimate of Ordinance 1597 Judicial District Populations, Modified to Keep Cities Intact
1990 U.S. Census Date

	Castroville-Pajaro	Gonzales	Greenfield	King City	Monterey-Carmel	Pacific Grove	Salinas	San Ardo	Soledad Including All	Soledad Excluding Prison	Total
Total Population	39,878	7,880	8,987	10,842	105,730	16,131	146,858	3,891	15,461	9,465	355,660
Latino	41%	76%	74%	61%	9%	6%	40%	26%	63%	80%	33%
White (NH)	52%	18%	22%	36%	71%	87%	43%	67%	19%	14%	52%
API	5%	5%	2%	1%	8%	5%	10%	2%	2%	4%	8%
Black	1%	1%	1%	1%	11%	1%	6%	4%	14%	1%	6%
IEA (NH)	1%	0%	1%	0%	1%	1%	1%	1%	0%	0%	1%
Other (NH)	0%	0%	1%	0%	0%	0%	0%	0%	1%	0%	0%
Population 18 +	27,472	4,960	5,577	7,123	83,431	13,287	100,988	2,798	12,072	6,076	257,709
Latino	36%	71%	71%	57%	8%	5%	35%	21%	56%	76%	28%
White (NH)	55%	21%	26%	40%	74%	88%	48%	71%	22%	18%	57%
API	6%	6%	2%	1%	8%	5%	11%	2%	2%	4%	8%
Black	1%	1%	1%	1%	10%	1%	6%	4%	18%	1%	6%
IEA (NH)	1%	0%	1%	0%	1%	1%	1%	1%	0%	0%	1%
Other (NH)	0%	0%	1%	0%	0%	0%	0%	0%	2%	0%	0%
Citizens 18 + (Estimated)											
Latino	23%	54%	51%	36%	6%	5%	23%	10%	39%	62%	17%
White (NH)	68%	37%	44%	60%	78%	90%	60%	81%	31%	31%	68%
API	6%	7%	3%	2%	5%	4%	9%	2%	2%	4%	7%
Black	2%	1%	1%	1%	10%	1%	7%	5%	26%	2%	8%
IEA (NH)	1%	1%	1%	1%	1%	1%	1%	2%	0%	1%	1%
Other (NH)	0%	0%	0%	0%	0%	0%	0%	0%	2%	0%	0%

NH = Non-Hispanic
IEA = American Indian, Eskimo, or Aleut
API = Asian or Pacific Islander

Columns may not appear to total 100 percent because of rounding.

Lapkoff Gobalet Demographic Research, Inc.

Monterey County Municipal Court Districts
Summary Table
Plan 7B

	1	2	3		4	Total
			Including All	Excluding Prison		
Total Population	35,691	34,547	31,630	25,634	253,792	355,660
Latino	75%	74%	55%	59%	18%	33%
White (NH)	17%	17%	35%	37%	64%	52%
API	5%	7%	1%	2%	9%	8%
Black	2%	2%	8%	1%	8%	6%
IEA (NH)	1%	0%	1%	1%	1%	1%
Other (NH)	0%	0%	1%	0%	0%	0%
Population 18+	22,220	21,797	22,836	16,842	190,854	257,709
Latino	69%	69%	49%	54%	16%	28%
White (NH)	22%	21%	37%	42%	58%	57%
API	5%	7%	1%	2%	9%	8%
Black	2%	2%	11%	2%	7%	6%
IEA (NH)	1%	1%	1%	1%	1%	1%
Other (NH)	0%	0%	1%	0%	0%	0%
Citizens 18 + (Estimated)	12,950	12,649	16,049	11,313	170,088	211,735
Latino	52%	52%	30%	33%	11%	17%
White (NH)	37%	35%	52%	61%	74%	68%
API	7%	8%	1%	2%	7%	7%
Black	3%	3%	14%	2%	8%	8%
IEA (NH)	1%	1%	1%	1%	1%	1%
Other (NH)	0%	0%	1%	0%	0%	0%

NOTE: Latino percentages exclude Hispanic Blacks and Hispanic APIs. A district's Hispanic percentage may be one percentage point higher than a district's Latino percentage.

NH = Non-Hispanic
IEA = American Indian, Eskimo, or Aleut
API = Asian or Pacific Islander
Columns may not appear to total 100 percent because of rounding.

Largest District	36,256
Smallest District	31,630
Difference	4,626
Ideal District	35,566
Deviation	13.0%

Lapkoff Gobalet Demographic Research, Inc.

DANIEL E. LUNGREN
Attorney General

State of California [SEAL]
DEPARTMENT OF JUSTICE

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September 29, 1995

By Facsimile Transmission

Hon. Mary M. Schroeder, Circuit Judge
Hon. James Ware, District Judge
Hon. Ronald M. Whyte, District Judge
UNITED STATES DISTRICT COURT
280 South First Street
San Jose, California 95113

RE: *Lopez v. Monterey County*
No. C-91-20559-RMW

Dear Judges Schroeder, Ware, and Whyte:

The State of California respectfully requests leave to file this supplemental letter. Questions from the Court argument yesterday, concerning the extent of the State's participation in these proceedings, raised a number of issues which should be more fully illuminated.

In answer to Plaintiffs' Complaint in this action, the County averred that the State of California was a necessary party to the proceedings because, by conducting elections in a county-wide municipal court district, the County was merely implementing state law. Plaintiffs successfully resisted the County's efforts to join the State

as a party. The Court specifically concluded that "complete relief is possible among the parties already involved in this action since the only issue which this court may properly address is whether the particular County ordinances at issue herein are subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enactment." (Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendant's Motions, p. 6.)[1] However, once the parties proposed to this Court a temporary remedial plan that called for the effective suspension of the State Constitution and state statutes, a new issue was necessarily presented, viz., whether disregard of state laws is necessary in order to effectuate Section 5 of the Voting Rights Act.

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[1] The California Constitution specifically states that "[e]ach county shall be divided into municipal court districts *as provided by statute. . . .* " (Cal. Const., art. VI, § 5(a); *see Cal. Gov. Code § 73560.*) Nevertheless, because the case was litigated on the theory that the *only* issue to be decided was whether the *ordinances* needed to be precleared, the State was not made a party to these proceedings and was not afforded an opportunity to defend on the merits of Plaintiffs claim. Accordingly, this Court's determination that the County's consolidation ordinances required preclearance would arguably not be binding on the State (*see, e.g., Truchninski v. Cushman*, 257 N.W.2d 286 (Minn. 1987); *Arnold Graphics Indust., Inc. v. Independent Agent Centers, Inc.*, 775 F.2d 38 (2d Cir. 1985)), and, pursuant to the state Constitution, the Legislature would be free to enact new, superseding statutes defining a county-wide municipal court district in Monterey. On this basis, it could certainly be argued that, in order to afford complete relief, the State should have been joined as a party and afforded an opportunity to raise any and all available defenses to the merits of Plaintiffs' claim. (*See, Sierra Club v. Leathers*, 754 F.2d 952 (11th Cir. 1985).)

No evidence whatsoever has been presented to this Court to establish that the prohibition against dividing cities (Cal. Const., art. VI, § 5(a)), or the constitutional linkage between the electoral base of a judge and the district over which the judge presides (Cal. Const., art. VI, § 16(b)) themselves violate the Voting Rights Act or are in any other manner unlawful. Certainly the adoption of these provisions by the citizens of California has not even been alleged to have been unlawful. Under such circumstances it is highly doubtful that this Court has jurisdiction to relieve the County of the obligation to comply with presumptively lawful state constitutional provisions in the drawing of municipal court district lines. Nevertheless, both Plaintiffs and the County contend that this is precisely what has already occurred – whether or not this court ever intended that such an effect by given its temporary order.

Clearly, the State of California has an interest in ensuring that its political subdivisions comply with the California Constitution in respect to the drawing of municipal court district lines. In view of the parties' characterization of the Court's action thus far – and their manifest intent to persist in characterizing this Court's order as having relieved the county of the obligation to comply with the State Constitution – if this court is going to take any action other than to dismiss the Complaint as moot,[2] the Court must vacate its earlier order *denying* the

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[2] The Court has an obligation to assess its jurisdiction at every stage of the proceedings, on its own motion. (*See, Morongo Band of Mission Indians v. Cal. State Bd. Equalization*, 849 F.2d 1197, 1199 (9th Cir. 1988); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365

County's motion to join the State as a necessary party, and instead *grant* that motion, thereby permitting the State to be joined as a full party defendant with the right to raise and litigate any and all available defenses to the

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n. 5 (7th Cir. 1988); *Klein v. AMFAC, Inc.*, 688 F.Supp. 1415, 1416 (N.D. Cal. 1988); *Adesanya v. United States*, No. C-92-0658 EFL, 1992 U.S.Dist. LEXIS 2488, p. 4 (N.D. Cal. 1992).) The State asserts that the instant matter may be moot because the consolidation ordinances were superseded by state law both in 1979 (Cal. Stats. 1979, ch. 694, § 1) and in 1989 (Cal. Stats. 1989, ch. 608, § 1) Furthermore, the State has already pointed out that, without regard to the effect of the *Legislature's* definition of the municipal court district, it is arguable that the County's adoption of some consolidation ordinances would necessarily render moot the question whether the *previous* consolidation ordinance needed to be precleared prior to "administration" in the next election – since *that* election would presumably be conducted pursuant to the *subsequent* consolidation ordinance, rather than pursuant to the earlier unprecleared ordinance. In addition, at the hearing on September 28, 1995, the Court was made aware of a letter from the Department of Justice that has been in Plaintiffs' possession since early March. That letter *expressly* states that "[t]he Attorney General does not interpose any objection to the *municipal court consolidation*, the interim election plan, the districting plan (as modified), the term of office, the procedures for conducting a June 6 special primary and an August 1 special runoff, and the additional judgeship." (Emphasis added). Plaintiffs' contention that the Department of Jutice [sic] precleared the underlying consolidation ordinances (the letter expressly notes that the County submitted for preclearance "the consolidation of the municipal and justice courts that existed on November 1, 1968, into a single municipal court with nine judgeships" and "the establishment of a tenth municipal court judgeship") because there is now a court-ordered election plan is a *non sequitur*. Since the consolidation of the 1968 districts has been precleared, then the requirements of 42 U.S.C. § 1973c have been satisfied, and the instant case is now moot.

prosecution of this action by Plaintiffs. Such defenses include, but would not necessarily be limited to, an assertion that the action is bared by laches or by a statute of limitations; a denial that the consolidation of judicial districts, with nothing more, is a voting practice subject to preclearance under Section 5; and a defense of mootness.

Furthermore, if the Court declines to dismiss the action as moot and instead, grants the County's motion to join the State as a necessary party, then the Court should vacate its April 1, 1993-Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendant's Motions. In accordance therewith, until the merits are determined upon motion by *all* proper parties, the Court should permit future municipal court judicial elections to take place in the county-wide district as defined by Cal. Gov. Code § 73560.[3] Not only should future elections

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[3] As was explained yesterday, the State maintains that the huge, "grapes to watermelons" disparity in the sizes of judicial districts in Monterey County in 1968 poses a very serious problem in defining "minority voting strength" for purposes of Section 5. That is to say, there is no apparent "baseline" from which to determine whether retrogression occurred thereafter. Certainly none was defined by the U.S. Department of Justice or the District Court for the District of Columbia.

Nevertheless, there is a rather simple, intuitively obvious means of comparing the 1968 majority-minority districts with the majority-minority districts fashioned in this Court's emergency interim race-based order, and that is to compare the percentage of the County's total population that is included in these districts, using the data submitted by the County. (See Holland Decl., Resolution No. 94-107, Ex. A, p. 1; Ex. J, p. 1.) This straightforward comparison reveals that the emergency plan has *radically increased Latino voting strength* in the County,

proceed undisturbed because the merits of the underlying claim have not been litigated by all parties who should be before the Court, but they should proceed undisturbed because, without a "strong basis in evidence

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and has dramatically reduced non-Latino voting strength – even without considering the fact that judges elected under the court-ordered plan are permitted to sit as judges of the entire county. If consideration is given to the voting-age non-prison populations, without regard to citizenry, then four of the 1968 judicial districts were "majority-minority" districts: Gonzales (pop., 7,880; 71% Latino); Greenfield (pop. 8,987; 71% Latino); King City (pop. 10,842; 57% Latino); and Soledad (pop. 9,465 [non-prison]; 76% Latino). However, these districts accounted for *only 10.63* percent of the total County (non-prison) population of 349,662. Applying this same analysis to the court-ordered race-based emergency plan, all but District 4 are majority-minority districts: District 1 is 69% Latino; District 2 is 69% Latino; and District 3 (non-prison) is 54% Latino. The combined total non-prison population of these three districts is 95,872, or *27.42 percent* of the total County (non-prison) population.

A similar dramatic change is seen if the focus is limited to voting-age non-prison *citizen* populations. Latino voting-age *citizens* constituted a majority of only three judicial districts in 1968: Gonzales (54%); Greenfield (51%); and Soledad (62%), with a combined non-prison population of only 26,332, or *7.53 percent* of the County's total non-prison population. In 1995, using this analysis, only District 1 (52%) and District 2 (52%) have Latino majorities; the total population of these two districts (70,238) comprises *20.09 percent* of the County's total non-prison population.

Furthermore, as the State has already pointed out, because the districts were not equipopulous, and because elected judges sat only in their respective districts, such districts may not be treated as comparable for purposes of assessing equality of relative voting strength, without at least some fair "weighting" of the data to account for differences in size.

of the harm being remedied" (*Miller v. Johnson*, 115 S.Ct. 2475, 2491 (1995)), there is no justication [sic] to diminish the voting strength of non-Latino voters in Monterey County relative to Latino voters in the County.

Sincerely,

DANIEL E. LUNGREN
Attorney General of California
DANIEL G. STONE
Deputy Attorney General

/s/ Manuel M. Medeiros
MANUEL M. MEDEIROS
Deputy Attorney General

cc: All Counsel (by FAX transmission)

DECLARATION OF SERVICE

Case Name: *Vicky M. Lopez, et al v. Monterey County, California*
Case No.: C-91-20559 RMW (eai)

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550.

On *October 2, 1995*, I served the attached

STATE'S SUPPLEMENTAL LETTER

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United

States Mail at Sacramento, California, addressed as follows:

Joaquin G. Avila
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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on October 2, 1995, at Sacramento, California.

MICHELLE L. LEVY — /s/ Michelle L. Levy
Name — Signature

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VICKY M. LOPEZ, *et al.*, Plaintiffs, v. MONTEREY COUNTY, CALIFORNIA; STATE OF CALIFORNIA, Defendants.	No. C-91-20559 RMW (Three-Judge Court) STATE OF CALIFORNIA'S ANSWER TO COMPLAINT (Filed Nov. 20, 1995)
STEPHEN A. SILLMAN, Intervenor.	

COMES NOW defendants STATE OF CALIFORNIA ("State"), pursuant to the Court's November 1, 1995 order joining the State as an indispensable party defendant, and answers the complaint for declaratory and injunctive relief on file in this purported Voting Rights Action as follows:

1. Answering paragraph 1, admits that the statutes, regulations, codes, and/or constitutional provisions cited therein speak for themselves. The remaining allegations contained in the paragraph 1 are merely argument, requiring no response by defendants; to the extent a response is required, the State denies each and every allegation contained therein.

2. Admits the allegations contained in paragraph 2.

3. Lacks sufficient information or belief to answer the allegations contained in paragraph 3, and, basing denial on that ground, denies each and every allegation contained therein.

4. Admits the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5.

6. Admits the allegations contained in paragraph 6.

7. Answering paragraph 7, admits that the statutes, regulations, codes, and/or constitutional provisions cited therein speak for themselves. The remaining allegations contained in the paragraph 7 are merely argument, requiring no response by defendants; to the extent a response is required, the State denies each and every allegation therein, and specifically denies that the Monterey County Board of Supervisors has any authority whatsoever to create, designate, modify, or consolidate justice court districts.

8. Admits the allegations contained in paragraph 8.

9. Denies each and every allegation contained in paragraph 9.

10. Denies each and every allegation contained in paragraph 10.

11. Denies each and every allegation contained in paragraph 11.

12. Denies each and every allegation contained in paragraph 12.

13. Admits the allegations contained in paragraph 13.

14. Admits the allegations contained in paragraph 14.

15. Admits the allegations contained in paragraph 15; however, defendant denies that, in conducting elections for municipal court judges, the County is implementing Ordinance No. 2524.

16. Denies each and every allegation contained in paragraph 16.

17. Denies each and every allegation contained in paragraph 17.

18. Admits the allegations contained in paragraph 18.

19. Admits the allegations contained in paragraph 19.

20. Admits the allegations contained in paragraph 20; however, defendant denies that, in conducting elections for municipal court judges, the County is implementing Ordinance No. 2920.

21. Denies each and every allegation contained in paragraph 21.

22. Denies each and every allegation contained in paragraph 22.

23. Denies each and every allegation contained in paragraph 23, and specifically and affirmatively alleges that "Monterey County Ordinance Nos. 2139, 2524, and 2930" have in fact been submitted to the United States Attorney General, that these ordinances have received Section 5 approval from the United States Department of Justice, and that plaintiffs have admitted these facts to this Court.

24. Lacks sufficient information or belief to answer the allegations contained in paragraph 24, and basing denial on that ground, denies each and every allegation contained therein.

25. Denies each and every allegation contained in paragraph 25.

26. Answering paragraph 26, defendant denies that the County implements the alleged ordinances in conducting elections for municipal court judges, and further denies that the alleged ordinances constitute "changes affecting voting" within the meaning of the Voting Rights Act.

27. Answering paragraph 27, admits that plaintiffs have requested the convening of a Three Judge Court to preside over this action.

28. Answering paragraph 28, repeats and incorporates by reference his answers to paragraphs 1 through 27 as if fully set forth herein.

29. Denies each and every allegation contained in paragraph 29.

30. Denies each and every allegation contained in paragraph 30.

31. Denies each and every allegation contained in paragraph 31.

32. Answering paragraph 32, admits that the statutes, regulations, codes, and/or constitutional provisions cited therein speak for themselves. The remaining allegations contained in the paragraph 32 are merely argument, requiring no response by defendants; to the extent a response is required, the State denies each and every allegation contained therein, and specifically and affirmatively alleges that the Monterey County Ordinances cited therein have in fact secured Section 5 approval from the United States Department of Justice and that plaintiffs have admitted this fact to this Court.

33. Answering paragraph 33, the State notes that the allegations contained therein appear to be merely argument, requiring no response by defendants; to the extent a response is required, the State denies each and every allegation contained therein.

AFFIRMATIVE DEFENSES

I.

The complaint is barred by the doctrine of laches.

II.

The complaint has been rendered moot by the March 6, 1995 preclearance of all relevant Monterey County

consolidation ordinances by the United States Department of Justice.

III.

The complaint has been further rendered moot by the fact that current elections of municipal court judges in Monterey County are conducted not pursuant to the Monterey County consolidation ordinances which are the subject of this action, but pursuant to superseding state statutes and provisions of the California Constitution. Plaintiffs have not alleged that these state statutes and constitutional provisions required Section 5 approval.

IV.

The complaint is barred by relevant statutes of limitations.

V.

Plaintiffs have failed to allege facts sufficient to state a claim for a race-based remedy.

VI.

No injunctive or other remedial order is appropriate in this action in light of the March 6, 1995 preclearance of all relevant Monterey County consolidation ordinances by the United States Department of Justice.

VII.

The complaint fails to state any claim against the State of California upon which relief of any sort can be granted.

WHEREFORE, defendant STATE OF CALIFORNIA respectfully prays that:

1. The complaint on file herein be dismissed with prejudice;

2. Judgment be entered against the plaintiffs and in favor of defendant State;

4. Defendant State be awarded its costs of suit incurred herein; and

5. Defendant State be awarded such other and further relief as the Court deems to be proper.

Dated: November 16, 1995

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California

LINDA CABATIC
Supervising Deputy
Attorney General

MANUEL M. MEDEIROS
Deputy Attorney General

/s/ Daniel G. Stone
DANIEL G. STONE
Deputy Attorney General

Attorneys for State of California

DECLARATION OF SERVICE

Case Name: *LOPEZ* v. *MONTEREY COUNTY, ET AL.*

Case No: U.S. District Court, Northern District Case No. C-91-20559 REM (eai) (Three Judge Court)

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1300 I Street, Sacramento, California 95814.

On *November 16, 1995,* I served the attached

STATE OF CALIFORNIA'S ANSWER TO COMPLAINT

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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MARGO BOX /s/ Margo Box
Signature